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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. VICTOR LEE PEREZ, Defendant and Appellant.	2d Crim. No. B207203 (Super. Ct. No. 2006014263) (Ventura County)

Victor Lee Perez appeals from the judgment (order granting probation) after a jury convicted him of possession of methamphetamine for sale (Health & Saf. Code, § 11378), possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). Appellant contends that the magistrate and trial court erred in denying his motion to suppress evidence. (Pen. Code, § 1538.5.)[1] We affirm.

Facts

On April 14, 2006 at about 11:00 p.m., Ventura County Deputy Sheriff Hector Macias responded to a vandalism call in Piru. Deputy Macias was told that a male

[1] The magistrate denied the motion on the ground that there was a lawful protective patdown for weapons, and on the alternative ground that drugs on appellant's person would have been inevitably discovered following appellant's arrest for being under the influence of a controlled substance. Appellant renewed the motion in superior court which was denied. (Pen. Code, § 1538.5, subd. (i).)

suspected of vandalizing a car, was wearing a black sweatshirt and pants and was walking eastbound on Center Street.[2] Appellant was wearing a black sweatshirt, appeared to be intoxicated, and was staggering down the street.

Deputy Macias detained appellant, shined a flashlight in his eyes, and noticed that appellant had large, dilated pupils that did not respond to light. Appellant was nervous and jittery, and appeared to be under the influence of a narcotic. The deputy decided to conduct a Drug Abuse Recognition (DAR) test which required close contact with appellant.

Concerned about his personal safety, Deputy Macias conducted a patdown for weapons before administering the DAR test. The deputy feared that appellant might be concealing a weapon due to the nature of the call, the time of night, and appellant's baggy clothing. During the patdown, Deputy Macias found a knife in a sweatshirt pouch and a marijuana pipe in appellant's front left pants pocket. Appellant said that he had marijuana on his person.

Deputy Macias continued the patdown and found an Altoids tin in appellant's front right pants pocket. In the tin container, were seven baggies of methamphetamine, two baggies of cocaine, and some marijuana. Appellant admitted using cocaine earlier that day and had $70 cash and a cell phone.

At trial, Deputy Macias and Narcotics Detective Juan Ponce opined that the methamphetamine was possessed for sale. It was stipulated that appellant's urine sample, provided after the arrest, tested positive for cocaine.

Protective Patdown

Appellant argues that the trial court erred in denying the motion to suppress evidence because the deputy lacked reasonable suspicion that appellant was armed and dangerous. On review, we defer to the trial court's express and implied factual findings which are supported by substantial evidence and determine whether on the facts so found,

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[2] The magistrate overruled appellant's *Harvey-Madden* objection (*People v. Harvey* (1958) 156 Cal.App.2d 516; *People v. Madden* (1970) 2 Cal.3d 1017), finding that the reasons for conducting the patdown were based on the deputy's observations. The deputy, in detaining and patting appellant down for weapons, was not acting solely on uncorroborated "police channels" information. (See *People v. Collin* (1973) 35 Cal.App.3d 416, 420.)

the patdown was reasonable. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) "Officers may undertake a properly limited search for weapons, if 'a reasonably prudent man . . . would be warranted in the belief that his safety or that of others was in danger.' " (*Id*., at p. 364.) In deciding to conduct a patdown search for weapons "[t]he officer need not be absolutely certain that the individual is armed . . . ." (*Terry v. Ohio* (1968) 392 U.S. 1, 27 [20 L.Ed.2d at p. 909]; see also *In re Richard G.* (2009) ___Cal.App.4th ___ [2009 DJDAR 6883].)

Appellant argues that no one saw him with a weapon and that his intoxication was not good cause to conduct a protective patdown. Appellant, however, appeared to be under the influence of drugs and alcohol and was wearing baggy clothing, making it difficult to discern whether he was carrying a weapon or drug paraphernalia that could be used as a weapon. The deputy was responding to a car vandalism call that could involve a weapon or propensity for violence.

Deputy Macias was also concerned about appellant's well being because appellant was intoxicated, staggering down the street, had dilated pupils, and appeared to be under the influence of a narcotic. In order to determine the nature and extent of the drug impairment, the deputy wanted appellant to perform several tests. Deputy Macias testified that he "was going to be watching -- looking at his eyes, trying to do all these different things, [and was] not going to be able to focus on [appellant's] hands." It was an officer safety concern because "people that are intoxicated are unpredictable . . . . It is very easy for someone in that situation to reach and grab a knife or anything like that and stab me with it . . . ."

Given the nature of the call and appellant's intoxication and baggy clothing, the deputy reasonably believed that the DAR test could not be administered without a safety-related patdown for weapons. Although Deputy Macias was responding to a vandalism call, his primary concern was appellant's drug impairment and ability to exercise due care for himself. (Pen. Code, § 647, subd. (f).)

The magistrate found that the radio call "is almost a red herring" because Deputy Macias saw appellant staggering and intoxicated. "[The deputy] certainly has the right to stop and approach the subject and check on the subject's well-being and condition.

[¶] What he observes immediately . . . indicate[s] to him that the subject may well be under the influence of a drug. It's dark. If he's going to perform an evaluation he's going to have to be in close proximity to this individual for a period of time. And he's going to be at risk should the defendant have any, either traditional weapons or, shall we say drug-related weapons, syringes, needles, what have you."

Citing *People v. Dickey* (1994) 21 Cal.App.4th 952, appellant urges us to reject testimony that the DAR test would have put the deputy in a compromising position and endanger the deputy's safety unless a patdown was conducted. But in *Dickey* the defendant was not intoxicated, staggering down a street, under the influence of a narcotic, or match the description of a vandalism suspect. "[W]here a reasonable suspicion of criminal activity exists, 'the public rightly expects a police officer to inquire into such circumstances. . . .' [Citation.]" (*People v. Wells* (2006) 38 Cal.4th 1078, 1087.)

Here the patdown and DAR test that followed was consistent with the officer's "community caretaking" duties. (*People v. Ray* (1999) 21 Cal.4th 464, 479-480.) Based on his training and expertise, Deputy Macias knew that it would be perilous to administer a DAR test without conducting a patdown for weapons. The magistrate and trial court did not err in finding that the patdown was reasonable given the circumstances of the stop, time of night, and appellant's intoxicated condition. (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1074.)

Inevitable Discovery

Assuming, arguendo, that the patdown violated appellant's Fourth Amendment rights, the motion to suppress was properly denied on the alternative theory of inevitable discovery. The doctrine of inevitable discovery provides that illegally seized evidence may be used where it would have been discovered by the police through lawful means. (*People v. Robles* (2000) 23 Cal.4th 789, 800.) "The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct." (*Nix v. Williams* (1984) 467 U.S. 431, 444, fn. 4 [81 L.Ed.2d 377, 387, fn. 4].)

It is settled that an officer has probable cause to arrest when the officer knows facts that would lead a person of ordinary care to entertain an honest and strong suspicion

that the suspect is committing a public offense in the officer's presence. (Pen. Code, § 836, subd. (a)(1); *People v. Price* (1991) 1 Cal.4th 324, 410.) Deputy Macias observed that appellant was intoxicated, staggering in the street, and had dilated pupils consistent with narcotics use. The officer had probable cause to arrest for being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)) or public intoxication (§ 647, subd. (f)).

Had Deputy Macias arrested appellant without first conducting a weapons patdown, the drugs would have been discovered during booking. (See e.g., *People v. Clark* (1992) 3 Cal.4th 41, 143.) "Where the formal arrest follow[s] quickly on the heels of the challenged search of [appellant's] person, we do not believe it particularly important that the search preceded the arrest rather than vice versa. [Citations.]" (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111 [65 L.Ed.2d 633, 645-646].)

Substantial evidence supports the finding that the drugs would have inevitably been discovered. (*People v. Emanuel* (1978) 87 Cal.App.3d, 205, 214.) Appellant's motion to suppress evidence was properly denied.

The judgment (order granting probation) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Douglas W. Daily, Judge

Superior Court County of Ventura

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